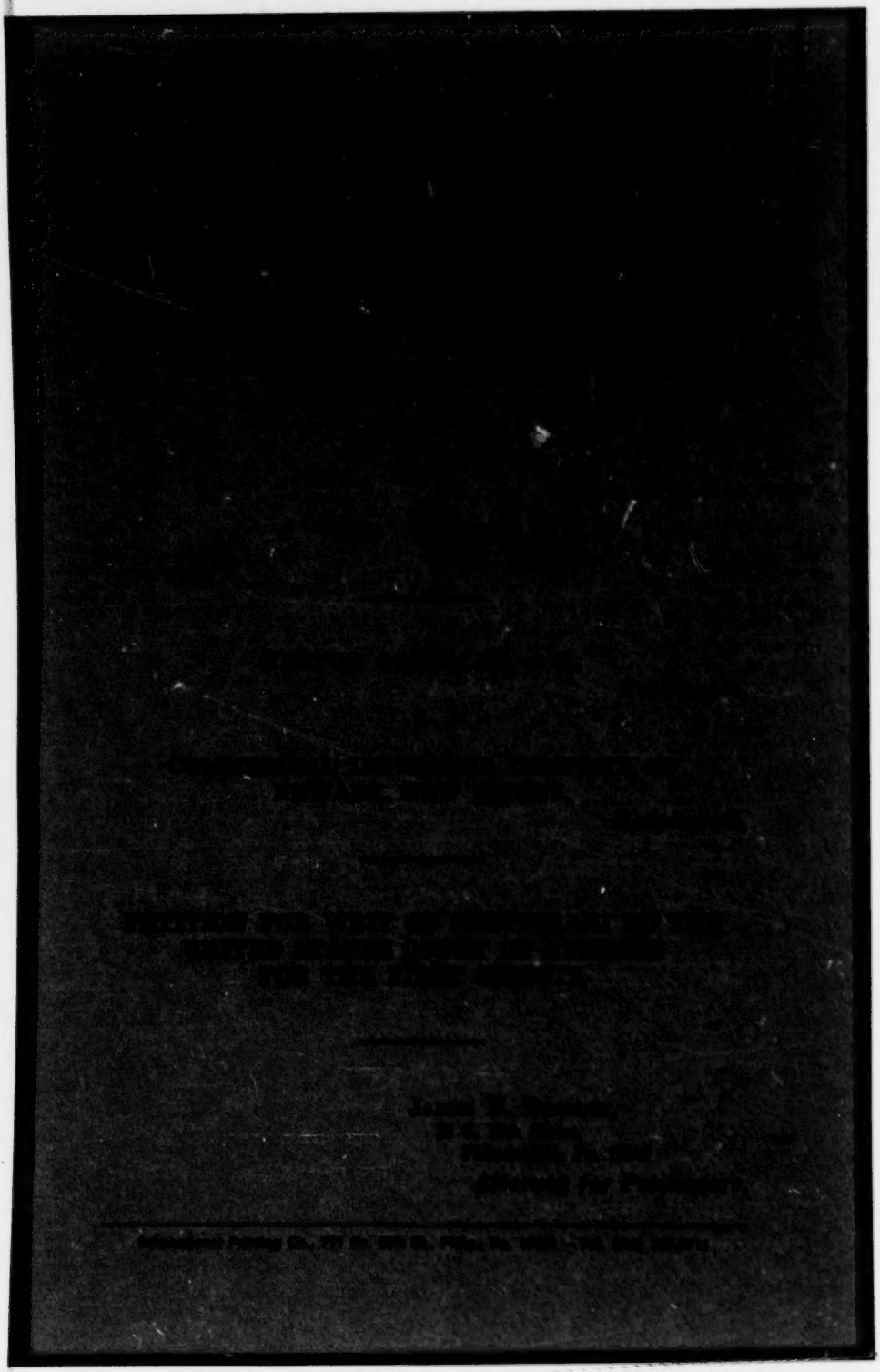

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Petitioners, comprising all defendant-counterclaimants injured in the airplane crash giving rise to this action, petition this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the First Circuit, and in support thereof aver the following:

REPORTS OF THE OPINIONS IN THE COURTS BELOW.

None of the opinions rendered by the courts below have been reported, either officially or unofficially.

JURISDICTIONAL STATEMENT.

Petitioners seek review of the judgment of the United States Court of Appeals for the First Circuit, rendered and entered on March 11, 1975 (a copy of which is appended hereto at pages A13 to A28). Petitioners' Petition for Rehearing was denied by Order of March 25, 1975 (appended hereto at pages A29 to A30).[1]

Petitioners believe that jurisdiction to review the judgment by writ of certiorari is conferred upon this Honorable Court by the Act of June 25, 1948, ch. 646, 62 Stat. 928 [28 U. S. C. § 1254(1)].

---

1. The plaintiff's motion for judgment *non obstante veredicto* in the trial court was made orally, and the trial court's denial thereof was not accompanied by a written opinion. Also appended hereto (at pages A31 to A42) is the Petition for Rehearing filed in the First Circuit.

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QUESTION PRESENTED FOR REVIEW.

Whether Petitioners were deprived of their constitutional right to a trial by jury, where the Court of Appeals, by shifting the burden of proof to defendants (Petitioners herein) on appeal, directed the entry of judgment *non osbtante veredicto* in favor of the plaintiff (Respondent herein), thereby preventing Petitioners from meeting this newly-created burden of proof at a retrial of the cause?

CONSTITUTIONAL PROVISION INVOLVED.

The Seventh Amendment to the United States Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE.

On December 6, 1968, a Conquest Airways, Inc. (Conquest) airplane crashed, killing seven persons, injuring twelve others and destroying two homes. Conquest's insurer, Commercial Insurance Company of Newark, New Jersey (Commercial), commenced this action in the United States District Court for the District of Puerto Rico, seeking a declaratory judgment that it had no obligation to provide insurance coverage under its policy with Conquest. In addition to Conquest, the injured claimants (Petitioners herein) were named as defendants. The injured claimants filed counterclaims, seeking judgments against Conquest and Commercial (under the Puerto Rican direct action statute) for their damages. Jurisdiction of the district court on all claims was based upon diversity of citizenship. 28 U. S. C. § 1332(a)(1).

After trial to a jury, a verdict was returned against the plaintiff Commercial on the coverage issue, and in favor of the defendants, against both Conquest and Commercial, on their counterclaims. Subsequent jury verdicts assessed the defendant-counterclaimants' damages in the total amount of $2,450,933. Final judgment was entered against Conquest and Commercial in that amount, together with pre-judgment interest and counsel fees pursuant to Puerto Rican law (A1-A12).

On appeal, the United States Court of Appeals for the First Circuit reversed, directing that judgment be entered in favor of the plaintiff Commercial on the coverage issue. The sole basis of the First Circuit's holding was that Conquest had violated a policy condition providing for a "Warranted co-pilot to be carried on all . . . night flights."

There admittedly was no co-pilot on the fatal flight, which began at 6:19 P. M., crashing moments later. Al-

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though sunset occurred at 5:43 P. M., four witnesses testified that it was still light at the time of the crash; one witness testified that it was dark.

The dispositive issue, therefore, was whether the fatal flight was a "night flight", as that term was used in the policy. On this issue, there was a complete absence of any testimony concerning the intent of the parties to the insurance contract, as well as conflicting testimony concerning the meaning given the term "night flight" by the aviation industry. The term "night flight" was not defined in the insurance policy, nor did the policy incorproate Federal Aviation Administration (FAA) definitions for such underfined terms. At least two, and possibly three Commercial agents negotiated the contract with Conquest; none of these agents was called by the plaintiff Commercial to testify at trial. Commercial did call Conquest's president, as on cross-examination, but he was not asked to give his understanding of the term "night flight". Conquest's president did testify, however, that the parties had agreed to waive the night flight condition on the plane involved in the crash (43b-47b);[2] because the entire policy was not produced at trial, it was impossible to determine whether this agreement had been reduced to writing. Conquest's president did not testify that the parties considered FAA regulations in reaching their agreement, or that the parties deemed them to be controlling.

The only evidence produced concerning the meaning of the term "night flight" came from the testimony of experienced aviators who had no relationship to the insurance contract. Commercial's expert testified that the term "night flight", as used in the aviation industry, meant the period between civil twilight and civil daylgiht (R. Tr. 74).

2. Commercial's appendix to the Court of Appeals is designated by "R. Tr." (Transcript). Claimants' appendix is designated by "b".

This witness did not refer to FAA regulations in giving this testimony, and indeed testified that his understanding was purely one of opinion, since he knew of no definition of "night flight" in the FAA regulations (142b). A second expert, listed by Commercial, was the Puerto Rican FAA administrator, who testified that he understood a "night flight" to begin thirty minutes after sunset (R. Tr. 467-68), that he did not know what the term meant to other aviators (R. Tr. 468), and that *the term was not defined in his agency's regulations* (R. Tr. 465). Still a third experienced aviator defined "night" as "dark", when "there was no more illumination from the rays of the sun" (R. Tr. 396).

The plaintiff Commercial moved for a directed verdict, arguing that the term "night flight" "must be given its common and ordinary interpretation as all ordinary people would understand" (R. Tr. 474). Since "flight" was defined in the insurance policy (differently from FAA regulations) and since the third expert noted above "said it was completely dark, it was night, there was no natural illumination" (R. Tr. 474), Commercial had "more than sustained the burden of showing this was a night flight" (R. Tr. 475).[3] Commercial did not argue that the FAA regulations, which defined "night" in similar terms to those used by Commercial's first expert, created a rebuttable presumption, binding in the absence of contrary proof.

The trial court denied Commercial's motion for a directed verdict (R. Tr. 481), and charged the jury, without exception, "that there is no official definition of night

3. Commercial also argued at trial that "Warranted co-pilot" constituted a "warranty" by Conquest that a co-pilot would be carried. On appeal, Commercial did not contend that this alleged "warranty" shifted the burden of proof, nor did the First Circuit so hold.

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flight'' (R. Tr. 510). The trial court also charged that it was the plaintiff's burden to prove its contentions by a preponderance of the evidence.

In moving for judgment n.o.v., Commercial did not refer to the FAA regulations' creating a presumptive definition of the contractual term, but merely contended that ''there was no ambiguity with respect to night flight'' (R. Tr. 537).

On appeal, the First Circuit directed the entry of judgment n.o.v. in favor of the plaintiff Commercial on a ground that had never been presented to the trial court. It held, first, that although ''night flight'' was not defined in the FAA regulations, the only permissible interpretation of the term under the regulations was flight at FAA ''night.'' Second, it created a presumption, not suggested at trial, that ''persons engaged in the aviation industry must be presumed to contract with relation to the accepted industry terminology to which they are subject unless there is something affirmative to the contrary'' (A22). Finally, with respect to defendants' newly-created affirmative burden to produce evidence contradicting this presumption, the First Circuit held: ''Here there was nothing.'' *Id.*

In their Petition for Rehearing, defendant-counterclaimants (Petitioners herein) argued that under Puerto Rican and prior First Circuit law, it was the interpretation of ''persons of usual and ordinary understanding'' that governed insurance contracts, that no prior case law existed where an undefined contractual term had been given a presumptive meaning favoring the insurer, and that to enter judgment under this new rule of law, without giving defendant-counterclaimants an opportunity to present the requisite ''affirmative evidence,'' deprived them of their constitutional right to a trial by jury (A31-A35). The Petition for Rehearing was denied (A29-A30).

ARGUMENT.

By Shifting the Burden of Producing Evidence to Defendants on Appeal, Petitioners, Absent a New Trial, Have Been Deprived of Their Constitutional Right to a Jury Trial.

This Court has repeatedly recognized the importance and vitality of the Seventh Amendment's guarantee of the right to a jury trial in civil cases. This Court has promulgated Rules to assure that all legal and factual issues are presented to the trial court. It has held that no court is justified in substituting its judgment for that of a jury, where due allowance for all reasonably possible inferences permits a verdict that is not based upon speculation. *E.g., Tennant v. Peoria & P. V. Ry.*, 321 U. S. 29, 33, 64 S. Ct. 409, 411 (1944).

Critical to the decision whether a verdict is based upon speculation is the allocation of the burden of proof. If a party having the burden of proof does not present sufficient affirmative evidence, there are no facts and inferences upon which a jury can reasonably base its verdict. However, the converse is not true. A party not having the burden of proof need not present affirmative evidence; he is entitled to require that a jury accept the affirmative evidence of the proponent and, absent such acceptance, to a verdict in his favor.

Despite the First Circuit's statement, in denying the Petition for Rehearing, that "it does not make any difference where is the burden of proof" (A30), it is clear that the allocation of burdens was critical in this case. Three experienced aviators testified that the FAA regulations did not define the term "night flight", and each gave a different interpretation of the term. If this testimony can be ig-

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nored, as the First Circuit apparently did, then the remaining question is what was the parties' understanding of the term as used in the insurance contract. Since *no* evidence was presented on this question, the plaintiff Commercial would have failed in its burden of proof. In order to avoid this conclusion, therefore, the First Circuit's holding created a presumption that changed the burden of proof to the defendants, so that it was the defendants, not the plaintiff, who had failed to meet their burden of producing "affirmative evidence."

Such a holding, used to justify one of the few instances in which a federal court has directed a district court to enter judgment, notwithstanding the verdict, in favor of a plaintiff, deprives the defendant-counterclaimants of their right to a jury trial. If a Court of Appeals may reverse a judgment upon a ground never suggested or adopted by the trial court, the defendants are, at the least, entitled to an opportunity to meet their newly-created burden by presenting evidence at a new trial.

Under Puerto Rican law, if an insurance contract be "susceptible of two interpretations, it should be most strongly construed in favor of the insured". *Barreras v. Santana,* 87 P. R. R. 215, 218 (1963). Exclusion clauses are "restrictively construed", *id.* at 221, and any doubts "shall be resolved to accomplish the purpose of the policy." *Id.* at 222. It is the duty of courts "to take the words of an insurance policy as they are found in it, and as persons with usual and ordinary understanding would construe them when buying the policy." *Id.* This was the state of Puerto Rican law at the time of trial (as well as today), and it had been accepted as such by the First Circuit. *Marston v. American Employers Ins. Co.,* 439 F. 2d 1035, 1039 (1st Cir. 1971). It was also established law that, because an insurance company authors the policy, its failure

to define contractual terms *in the policy* creates an ambiguity which must be construed against the insurer. *E.g., Pre-Cast Concrete Products, Inc. v. Home Ins. Co.*, 417 F. 2d 1323, 1325, 1329-30 (7th Cir. 1969); *see Ranger Ins. Co. v. Culberson*, 454 F. 2d 857, 861 (5th Cir. 1971). Finally, it was established law that the proponent of an issue is not entitled to a directed verdict unless its evidence is uncontradicted and unimpeached, no conflicting inferences are permissible, and the case is not dependent upon the credibility witnesses. *Federal Ins. Co. v. Summers*, 403 F. 2d 971, 976 (1st Cir. 1968).

This was the law upon which the case was tried, upon which the plaintiff Commercial presented its motion for a directed verdict, upon which the jury returned its verdict in favor of the defendants, and upon which the defendants were entitled to rely.

The First Circuit avoided these established rules by changing the "person with usual and ordinary understanding" to a "businessman or a professional . . . [with] the usual sophistication and understanding of those in the industry" (A22 n. 11), by ignoring the unanimous expert testimony that no definition of "night flight" existed in the FAA regulations, by ignoring the clear dispute among experienced aviators ("businessmen or professionals") concerning the industry's understanding of the term, and, finally, by creating a presumption not contained in any testimony, argument or ruling in the trial court.

This Court has consistently recognized that the right to a jury trial can be preserved only when litigants are advised, at trial, of the legal theories upon which a case is presented. To change the "ground rules" on appeal, absent a new trial, constitutes a deprivation of the right to a jury determination of factual issues. Thus, for example, in *Weade v. Dichman, Wright & Pugh, Inc.*, 337 U. S. 801, 808-09, 69 S. Ct. 1326, 1330 (1949), plaintiff tried and won a

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jury verdict on an agency theory later held inapplicable by the appellate court; this Court, agreeing that the agency theory was inapplicable, reversed the entry of judgment for defendants so that plaintiff could pursue an individual negligence theory abandoned after the trial court's acceptance of the agency theory. In *Fountain v. Filson,* 336 U. S. 681, 69 S. Ct. 754 (1949), this Court reversed the grant of summary judgment for appellant, because no appropriate motion had been filed in the district court; absent remand "the party who had won in the trial court would be deprived of any opportunity to remedy the defect which the appellate court discovered in his case." 336 U. S. at 683, 69 S. Ct. at 756; *accord, e.g., Cone v. West Virginia Pulp & Paper Co.,* 330 U. S. 212, 217, 67 S. Ct. 752, 755 (1947); *see Schaff v. R. W. Claxton, Inc.,* 144 F. 2d 532 (D. C. Cir. 1944). Similar considerations require that a party moving for a directed verdict "shall state the specific grounds therefor." Fed. R. Civ. P. 50(a); *see Virginia-Carolina Tie & Wood Co. v. Dunbar,* 106 F. 2d 383, 385 (4th Cir. 1939).

A situation closely analogous to this case arose in *Byrd v. Blue Ridge Electric Co-operative,* 356 U. S. 525, 78 S. Ct. 893 (1958). There, as here, the district court determined that the proponent's evidence did not require response from the injured party in order to avoid a directed verdict; there, as here, the Court of Appeals reached a different interpretation of local law, holding that, absent rebuttal testimony, the proponent was entitled to a directed verdict; and there, as here, the Court of Appeals rejected appellee's contention that his right to a jury trial required a remand so that he could have an opportunity to cure the defects in his case. This Court reversed, holding that the Petitioner's right to a jury trial entitled him to an opportunity to present evidence under the appellate court's interpretation of the law:

> "The petitioner was fully justified in that circumstance in not coming forward with proof of his own at that stage of the proceedings, for he had nothing to meet under the District Court's view of the [law]. He thus cannot be penalized by the denial of his day in court to try the issue under the correct interpretation of the [law]." 356 U. S. at 533, 78 S. Ct. 898.

In this case, there was a clear conflict of expert testimony concerning the definition of "night flight"; there was unanimous testimony that "night flight" was not defined in the FAA regulations. And, because the plaintiff Commercial presented no evidence concerning the actual intent of the contracting parties, the defendants were entitled to rely upon the proponent's (Commercial's) established burden of proof in arguing that "there is insufficiency of any substantial evidence on any of the issues involved in the construction of this insurance contract" (R. Tr. 470). If the appellate court can properly create a presumption which shifts the burden of proof to the defendants (Petitioners herein), the defendants are entitled to the opportunity to meet this burden.

CONCLUSION.

For the foregoing reasons, Petitioners respectfully pray that this Honorable Court will issue a writ of certiorari to the United States Court of Appeals for the First Circuit, to review that court's departure from the protections afforded Petitioners by the Seventh Amendment of the United States Constitution.

Respectfully submitted,

JAMES E. BEASLEY,
Attorney for Petitioners.

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Appendix.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO.

Civil No. 60-69 and Civil No. 368/1973.
(in the District Court of the Virgin Islands)

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY,

Plaintiff,

v.

HECTOR GONZALEZ AND CONQUEST AIRWAYS, INC., ET AL.,

Defendants.

Civil No. 28-69.

FABIO ESCALONA ALMEIDA, ET AL.,

Plaintiffs,

v.

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY,

Defendant.

Civil No. 612-69.

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PHYLLIS ZINER AND SAUL ZINER,
Plaintiffs,

v.

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY, ET AL.,
Defendants.

FINAL JUDGMENT.

All issues in the several actions consolidated under Civil No. 60-69 in this court having been resolved, pursuant to prior order of this Court and of the District Court of the Virgin Islands, and upon verdicts, default judgments and orders of this Court heretofore entered, it is now,

ORDERED AND ADJUDGED, that the complaint of Commercial Insurance Company of Newark, New Jersey against Hector L. Gonzalez be, and it hereby is, dismissed with prejudice; and further

ORDERED AND ADJUDGED, that on the issue of coverage, judgment is entered in favor of the defendants, Conquest Airways, Inc. and the beneficiaries, defendants herein, and against plaintiff, Commercial Insurance Company of Newark, New Jersey; and further

ORDERED AND ADJUDGED, that on the issue of liability, judgment is entered in favor of the passengers and other injured parties, defendants herein, and against Conquest Airways, Inc.; and further

ORDERED AND ADJUDGED, that the counter-claimants, cross-claimants represented by Nachman, Feldstein & Gelpi, recover of the plaintiff Commercial Insurance Company of Newark, New Jersey, costs heretofore taxed in the amount

of FOUR THOUSAND FORTY-THREE DOLLARS AND THIRTY-FIVE CENTS ($4,043.35); and further

ORDERED AND ADJUDGED, that Phyllis Ziner recover of Commercial Insurance Company of Newark, New Jersey and Conquest Airways, Inc., the sum of THIRTY THOUSAND DOLLARS ($30,000.00), with interest thereon at the rate of six percent (6%) per annum as provided by law, from the date of filing of the complaint, January 23, 1969, and the costs of action; and further

ORDERED AND ADJUDGED, that Saul Ziner recover of Commercial Insurance Company of Newark, New Jersey and Conquest Airways, Inc., the sum of FIVE THOUSAND DOLLARS ($5,000.00), with interest thereon at the rate of six percent (6%) per annum as provided by law, from the date of filing of the complaint, January 23, 1969, and the costs of action; and further

ORDERED AND ADJUDGED, that Haydee Mauline de Escalona, recover of Commercial Insurance Company of Newark, New Jersey and Conquest Airways, Inc., the sum of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00), with interest thereon at the rate of six percent (6%) per annum as provided by law, from the date of filing of the complaint, January 23, 1969, and the costs of the action; and further,

ORDERED AND ADJUDGED, that Fabio Escalona Almeida, recover of Commercial Insurance Company of Newark, New Jersey and Conquest Airways, Inc., the sum of FIFTEEN THOUSAND DOLLARS ($15,000.00), with interest thereon at the rate of six percent (6%) per annum as provided by law, from the date of filing of the complaint, January 23, 1969, and the costs of the action; and further,

ORDERED AND ADJUDGED, that Jorge Escalona Maulini, recover of Commercial Insurance Company of Newark,

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New Jersey and Conquest Airways, Inc., the sum of TEN THOUSAND DOLLARS ($10,000.00), with interest thereon at the rate of six percent (6%) per annum as provided by law, from the date of filing of the complaint, January 23, 1969, and the costs of the action; and further,

ORDERED AND ADJUDGED, that Ana Maria Maulini, recover of Commercial Insurance Company of Newark, New Jersey and Conquest Airways, Inc., the sum of TEN THOUSAND DOLLARS ($10,000.00), with interest thereon at the rate of six percent (6%) per annum as provided by law, from the date of filing of the complaint, January 23, 1969, and the costs of the action; and further,

ORDERED AND ADJUDGED, that Susan Grover Marin, recover of Commercial Insurance Company of Newark, New Jersey and Conquest Airways, Inc., the sum of FIFTEEN THOUSAND DOLLARS ($15,000.00), with interest thereon at the rate of six percent (6%) per annum as provided by law, from the date of filing of the complaint, January 23, 1969, and the costs of the action; and further,

ORDERED AND ADJUDGED, that Conquest Airways, Inc. recover of Commercial Insurance Company of Newark, New Jersey, the sum of TWO HUNDRED FORTY-TWO THOUSAND FIVE HUNDRED DOLLARS ($242,500.00), with interest thereon at the rate of six percent (6%) per annum as provided by law, from the date of filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Annie Lou McBride recover of Commercial Insurance Company of Newark, New Jersey and Conquest Airways, Inc., the sum of NINETY-EIGHT THOUSAND SEVEN HUNDRED SIXTY-NINE DOLLARS AND TWO CENTS ($98,769.02) with interest thereon at the rate of six percent (6%) per annum as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Ronzee McIntire Bridges, recover of Commercial Insurance Company of Newark, New Jersey and Conquest Airways, Inc., the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) with interest thereon at the rate of six percent (6%) per annum as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Eugenia McBride Bridges, recover of Commercial Insurance Company of Newark, New Jersey and Conquest Airways, Inc., the sum of FIFTEEN THOUSAND DOLLARS ($15,000.00) with interest thereon at the rate of six percent (6%) per annum as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that David Gehring, recover of Commercial Insurance Company of Newark, New Jersey and Conquest Airways, Inc., the sum of FIFTY-FIVE THOUSAND DOLLARS ($55,000.00) with interest thereon at the rate of six percent (6%) per annum as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Joan Gehring, recover of Commercial Insurance Company of Newark, New Jersey and Conquest Airways, Inc., the sum of FORTY THOUSAND DOLLARS ($40,000.00) with interest thereon at the rate of six percent (6%) per annum as provided by law, from the date of filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Edward Stawicki, recover of Commercial Insurance Company of Newark, New Jersey and Conquest Airways, Inc., the sum of FORTY-FOUR THOUSAND ONE HUNDRED FIFTY DOLLARS ($44,150.00) with interest

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thereon at the rate of six percent (6%) per annum as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Paul Auster, recover of Commercial Insurance Company of Newark, New Jersey and Conquest Airways, Inc., the sum of THIRTY-TWO THOUSAND TWO HUNDRED DOLLARS ($32,200.00) with interest at the rate of six percent (6%) per annum as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Luther Benjamin and Delta Benjamin recover of Commercial Insurance Company of Newark, New Jersey the sum of ONE HUNDRED TWENTY-FIVE THOUSAND DOLLARS ($125,000.00), with interest thereon at the rate of six percent (6%) per annum as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Joseph Ledee recover of Commercial Insurance Company of Newark, New Jersey, the sum of TWENTY-SEVEN THOUSAND THREE HUNDRED SEVENTY-FIVE DOLLARS ($27,375.00), with interest thereon at the rate of six percent (6%) per annum as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that John Roberts, on behalf of the Estate of David Burton Roberts, recover of Commercial Insurance Company of Newark, New Jersey and Hector Gonzalez and Conquest Airways, Inc., the sum of FOUR HUNDRED TWENTY-TWO THOUSAND ONE HUNDRED EIGHT DOLLARS ($422,108.00), with interest thereon at the rate of six percent (6%) per annum as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that John Roberts, recover of Commercial Insurance Company of Newark, New Jersey and Hector Gonzalez and Conquest Airways, Inc., the sum of SEVENTY-FIVE THOUSAND FIVE HUNDRED DOLLARS ($75,500.00), with interest thereon at the rate of six percent (6%) per annum, as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Sarah Roberts, recover of Commercial Insurance Company of Newark, New Jersey and Hector Gonzalez and Conquest Airways, Inc., the sum of FIFTY-EIGHT THOUSAND FIVE HUNDRED DOLLARS ($58,500.00), with interest thereon at the rate of six percent (6%) per annum, as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Luther Benjamin, on behalf of the Estate of Nellie Theresa Benjamin, recover of Commercial Insurance Company of Newark, New Jersey, the sum of TWO HUNDRED TWENTY THOUSAND FIVE HUNDRED DOLLARS ($220,500.00), with interest thereon at the rate of six percent (6%) per annum, as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Luther Benjamin and Delia Benjamin recover of Commercial Insurance Company of Newark, New Jersey, the sum of THIRTY-FOUR THOUSAND DOLLARS ($34,000.00) with interest thereon at the rate of six percent (6%) per annum, as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Agnes Delia Benjamin, recover of Commercial Insurance Company of Newark,

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New Jersey, the sum of EIGHT THOUSAND FIVE HUNDRED EIGHTY-ONE DOLLARS ($8,581.00), with interest thereon at the rate of six percent (6%) per annum as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Luther Benjamin, on behalf of the Estate of Carmen Maria Benjamin, recover of Commercial Insurance Company of Newark, New Jersey, the sum of SIX HUNDRED THOUSAND FIVE HUNDRED DOLLARS ($600,500.00) with interest thereon at the rate of six percent (6%) per annum, as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Luther Benjamin and Delia Benjamin recover of Commercial Insurance Company of Newark, New Jersey, the sum of FIFTY ONE THOUSAND DOLLARS ($51,000.00), with interest thereon at the rate of six percent (6%) per annum, as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Agner Delia Benjamin, recover of Commercial Insurance Company of Newark, New Jersey, the sum of TEN THOUSAND FIVE HUNDRED DOLLARS ($10,500.00), with interest thereon at the rate of six percent (6%) per annum, as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that John A. Richardson, on behalf of the Estate of Severina Richardson, recover of Commercial Insurance Company of Newark, New Jersey, the sum of ONE HUNDRED SIXTEEN THOUSAND FOUR HUNDRED FIFTY-FIVE DOLLARS ($116,455.00), with interest thereon

at the rate of six percent (6%) per annum, as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that John A. Richardson and Mary Agatha Richardson, recover of Commercial Insurance Company of Newark, New Jersey, the sum of TEN THOUSAND NINE HUNDRED FIFTY-NINE DOLLARS AND TWENTY CENTS ($10,959.20), with interest thereon at the rate of six percent (6%) as provided by law, from the date of the filing of the complaint, January 23, 1969 and the costs of action; and further,

ORDERED AND ADJUDGED, that Jacqueline Benjamin Jacobs, on behalf of the Estate of Edward C. Wheatley, recover of Commercial Insurance Company of Newark, New Jersey, the sum of TWO HUNDRED TEN THOUSAND TWO HUNDRED FORTY DOLLARS ($210,240.00), with interest thereon at the rate of six percent (6%) per annum, as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Jacqueline Benjamin Jacobs, recover of Commercial Insurance Company of Newark, New Jersey the sum of TWO THOUSAND FIVE HUNDRED FIFTY-SIX DOLLARS ($2,556.00), with interest thereon at the rate of six percent (6%) per annum, as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Agnes Delia Benjamin, recover of Commercial Insurance Company of Newark, New Jersey, the sum of ONE THOUSAND FIVE HUNDRED DOLLARS ($1,500.00) with interest thereon at the rate of six percent (6%) per annum, as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

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ORDERED AND ADJUDGED, that Luther Benjamin recover of Commercial Insurance Company of Newark, New Jersey, the sum of TWO HUNDRED NINETY DOLLARS ($290.00) with interest thereon at the rate of six percent (6%) per annum, as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Laurita Ledee, recover of Commercial Insurance Company of Newark, New Jersey, the sum of ONE THOUSAND FIVE HUNDRED DOLLARS ($1,500.00) with interest thereon at the rate of six percent (6%) per annum, as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Yvette Maria Delemos, by her guardians Luther Benjamin and Delia Benjamin, recover of Commercial Insurance Company of Newark, New Jersey, and Hector Gonzalez and Conquest Airways, Inc., the sum of ONE THOUSAND FIVE HUNDRED DOLLARS ($1,500.00) with interest thereon at the rate of six percent (6%) per annum, as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Joseph Ledee, recover from Commercial Insurance Company of Newark, New Jersey, the sum of SEVEN HUNDRED FIFTY DOLLARS ($750.00), with interest thereon at the rate of six percent (6%) per annum, as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that Karel Perez, recover of Commercial Insurance Company of Newark, New Jersey, and Hector Gonzalez and Conquest Airways, Inc., the sum

of ONE THOUSAND FIVE HUNDRED DOLLARS ($1,500.00), with interest thereon at the rate of six percent (6%) per annum, as provided by law, from the date of the filing of the complaint, January 23, 1969, and the costs of action; and further,

ORDERED AND ADJUDGED, that all parties represented by the firm of Beasley, Hewson, Casey, Kraft & Colleran, and Roberto Matos, Esq., and the Firm of Birch, DeJongh & Farrelly, recover of Commercial Insurance Company of Newark, New Jersey, the aggregate sum of EIGHTEEN THOUSAND DOLLARS ($18,000.00) as attorneys fees, the ultimate distribution of which shall be in the same proportion as each judgment of each claimant represented by said attorneys bears to the total judgments in favor of the claimants represented by said attorneys; and further,

ORDERED AND ADJUDGED, that all parties represented by the firm of Nachman, Feldstein & Gelpi, recover of Commercial Insurance Company of Newark, New Jersey, the aggregate sum of SEVENTY-TWO THOUSAND DOLLARS ($72,000.00) as attorneys fees, the ultimate distribution of which shall be in the same proportion as each judgment of each claimant represented by said attorneys bears to the total judgments in favor of the claimants represented by said attorneys; and further,

ORDERED AND ADJUDGED, that all parties represented by Santiago Polanco Abreu, Esq., and George Weasler, Esq., recover of Commercial Insurance Company of Newark, New Jersey, the aggregate sum of FIFTY-THREE THOUSAND DOLLARS ($53,000.00) as attorneys fees, the ultimate distribution of which shall be in the same proportion as each judgment of each claimant represented by said attorneys bears to the total judgments in favor of the claimants represented by said attorneys; and further,

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ORDERED AND ADJUDGED, that all parties represented by the firm of Bird & Bird, recover of Commercial Insurance Company of Newark, New Jersey, the aggregate sum of THIRTY-FIVE THOUSAND DOLLARS ($35,000.00) as attorneys fees, the ultimate distribution of which shall be in the same proportion as each judgment of each claimant represented by said attorneys bears to the total judgments in favor of the claimants represented by said attorneys; and further,

ORDERED AND ADJUDGED, that Paul Oster and Edward Stawicki recover of Commercial Insurance Company of Newark, New Jersey the sum of FIVE THOUSAND DOLLARS ($5,000.00) in additional attorneys fees in connection with the trial of the issue of damaged, said sum to be prorated between then in the same ratio as the damages awarded to each of said parties bears to the total of the damages awarded to said parties.

GIVEN AT SAN JUAN, PUERTO RICO, this 31st day of January, 1974.

HIRAM R. CANCIO,
Hiram R. Cancio,
Chief Judge, United States District Court.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 74-1132

COMMERCIAL INSURANCE COMPANY
OF NEWARK, NEW JERSEY,
Plaintiff, Appellant,

v.

HECTOR GONZALEZ ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO.

Before COFFIN, *Chief Judge*, ALDRICH and
CAMPBELL, *Circuit Judges.*

John A. Perkins, with whom *Jeffrey Swope* and *Palmer & Dodge* were on brief, for appellant.

Harvey B. Nachman and *James E. Beasley*, with whom *Beasley, Hewson, Casey, Kraft & Colleran; Nachman, Feldstein & Gelpi; Antonio M. Bird, Jr.*, and *Bird & Bird* were on brief, for defendant-counterclaimants appellees.

S. Polanco-Abreau, with whom *George Weasler* was on brief, for Hector Gonzalez and Conquest Airways, Inc., appellees.

OPINION OF THE COURT.

March 11, 1975.

ALDRICH, *Senior Circuit Judge.* On December 6, 1968, a Twin Beech aircraft, carrying ten passengers and a pilot,

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took off from the St. Thomas, Virgin Islands, airport at 6:19 PM, but failed to clear a hill beyond the runway and crashed in a residential area. Seven persons, including Mars, the pilot, were killed, and twelve were injured. The plane was owned by Conquest Airways, Inc., a Puerto Rico corporation, of which one Gonzalez was president, and was insured for hull and liability by Commercial Insurance Company of Newark, New Jersey. Commercial promptly brought this action in the Puerto Rico district court for a declaration of non-liability. Counterclaims on behalf of Conquest, Gonzalez and all persons killed or injured were duly filed seeking recovery under Puerto Rico's direct action statute. Commercial appeals from judgments based upon a jury determination of liability, four jury verdicts assessing claimants' damages in excess of two million dollars, and court awards of attorneys fees for "obstinacy."

Liability.

Simply put, although substantively complex, Commercial disclaimed on the grounds that Mars did not have the experience required to meet the policy's specifications, and because there should have been a co-pilot in any event. Again, speaking broadly, the district court held, *inter alia*, that the provisions of the policy upon which Commercial relied to deny recovery were ambiguous and should be construed by the jury in claimants' favor; *e.g.*, that a "command pilot" was different from a "pilot in command," and that a flight, although exclusively during the night as defined by Federal Aviation Administration (FAA) regulations, was not a "night flight."

Pilot Qualifications.

As originally written, the policy covered a single plane, a Dornier, and certain named pilots. There was a provision

under which other planes could be added by agreement, by which the Twin Beech was subsequently included. Under an Open Pilot Clause, Endorsement 2, certificated pilots could be added at will, provided they had a certain accumulated experience and Commercial was notified. Mars was hired three days before the accident.[1] To qualify under the Open Pilot Clause he was required to have "logged [2] a minimum flying time of 2,500 hours as *command pilot* [to include not less than] 1000 hours on multi-engine aircraft . . . and 100 hours total time [3] during the last 12 months." (Emphasis suppl.) Mars had not logged the requisite hours if "command pilot" means "pilot in command," a term defined in the FAA regulations as applying, in the case of a multi-engine plane, only to the first pilot.[4] However, although at first blush the terms might look the same, we agree with claimants that "command pilot" may have a broader meaning by virtue of the regulations. 14 C. F. R. § 61.39(c) provides with respect to a pilot's qualifying for a certificate,

> "(c) *Pilot in command time.* A private or commercial pilot may log as pilot in command only the flight time during which he is the only manipulator of the controls of an aircraft for which he is rated or the flight time during which he is the only occupant of the aircraft."

---

1. The notification form was required to be filed within 15 days. Mars had made one out, and it was filed within the time. Neither party takes anything from the fact that it was not filed before the accident. We mention this point only to reject a suggestion that Mars had 15 "free" days even if his qualifications were deficient. We take the issue to be simply whether, in fact, he met the qualifications.

2. We agree with claimant that "logged" does not necessarily mean recorded in some log, but merely that it had occurred.

3. Again, we agree with claimants that "total time" includes time not in command.

4. " 'Pilot in command' means pilot responsible for the operation and safety of an aircraft during flight time." 14 C. F. R. § 1.1.

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If under this section a pilot in command cannot count as command time the hours he surrenders the controls to the second pilot, there would seem at least a permissible inference that the second pilot is, pro tanto, accumulating his own "command time," even thought not as "pilot in command." This inference may be thought reinforced by section 61.39(d).[5]

Commercial could have contradicted any unfavorable inference by using the regulations' word of art, pilot in command. We may agree that the 2d-pilot's "command time" is not the full equivalent of pilot in command, since he does not have full responsibility for the aircraft. However, when parties contract with reference to an industry whose terms are defined by an active supervising agency like the FAA, it is to be assumed in the absence of evidence to the contrary, that they have that terminology in mind. *Cf. Superior Business Assistance Corp. v. United States,* 10 Cir., 1972, 461 F. 2d 1036, 1039; *Arc & Gas Welder Associates, Inc. v. Green Fuel Economizer Co.,* 4 Cir., 1960, 285 F. 2d 863, 868, *cert. denied,* 366 U. S. 919; *Petro v. Ohio Cas. Ins. Co.,* S. D. Cal., 1950, 95 F. Supp. 59, 62. When Commercial failed to use the regulation-defined phrase, the jury was warranted in finding it intended not what otherwise might be thought an ellipsis, but a lesser meaning; particularly so if the regulation itself suggested that lesser meaning.

We observe, further, that the notification form supplied by Commercial for pilots claiming to qualify under the Open Pilot Clause did nothing to lessen this inference, and if anything, reinforced it. Instead of providing space for

5. "(d) *Second in command time.* A private or commercial pilot may log as second in command that flight time during which he is performing the duties of a second in command. He may be credited with not more than 50 percent of that kind of flight time toward the total flight time required for a higher certificate or rating."

listing "pilot in command" hours, it supplied three columns, headed "1st Pilot," "Co-Pilot" and "Total."[6] If "command time" in the Open Pilot Clause meant only pilot in command time, the form could easily have been more specific. Failing this, we cannot say the jury was required to interpret the policy as Commercial contends.[7] Gonzalez testified that he gave Mars the form, telling him it was to record his "command time." *Inter alia,* Mars wrote 3400 hours as Co-Pilot of multi-engine planes, and opposite it, as "Total," 1700 hours. Although the question may be close, and was made perhaps closer by other evidence suggesting that the 3400 hours figure itself was a considerable exaggeration, we cannot say that the jury could not conclude that Mars had satisfied the Open Pilot Clause's requirements.

Next, Commercial points to a provision in the Open Pilot Clause which required pilots to be checked out "in

6. The statement in Commercial's reply brief, "The pilot information form expressly uses the terms 'Pilot in Command' and 'Co-Pilot' in contradistinction to each other," perhaps the keystone to its argument that there is no ambiguity, is simply not so. Quite apart from section 61.39(c)'s indication that all hours spent as 1st pilot do not count as pilot in command time, to call for a combined total is not to emphasize distinctions.

7. We remark that this does not mean what the court on several occasions charged the jury, "Whenever you find that an ambiguity does exist, you must resolve all questions in favor of the insured." In light of the court's apparent misunderstanding of our decision in *Marston v. American Employers Ins. Co.*, 1 Cir., 1971, 439 F. 2d 1035, we note that grounds, including appropriate extrinsic evidence, may be found to show that the unfavorable interpretation was the one reasonably understood by both parties. *See Marston,* ante, at 1040. That the court misunderstood this is apparent, not only from its charge, but from the fact that in awarding counsel fees for "obstinacy" one of its reasons, (relating to night flight, post), was that the company sought to persuade the jury that the circumstances warranted a particular interpretation in its favor, which we read not as weighing the sufficiency of its reasons, but simply as penalizing the company for trying at all. It is only when an ambiguity finally remains that it is to be construed against the company.

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type by Dornier Factory or Professional Pilot Checkout Organization." Gonzalez explained that this was because the Dornier plane had some peculiarities, and that he subsequently asked that this restriction be lifted. Quite possibly in response to this, Endorsement 7, under which the Twin Beech was added, incorporated "Endorsements 1, 2 (without requisite to be checked out by Dornier Factory)." Commercial claims it was still necessary to be checked out by a professional pilot organization. However, it was meaningless simply to omit checking by Dornier Factory as a "requisite." Checking by Dornier never was a requisite; there was always the alternative. We cannot quite say, when Commercial used this phrase in the endorsement following Gonzalez' request, that it was not open to the jury to find that it meant to remove the entire checkout requirement, so that the fact that no organizational checkout was made is of no consequence.[8]

The Absence of a Co-Pilot.

We mention briefly Commercial's disclaimer based on the presence of a tenth passenger seat, a violation of a recent FAA regulation unless there were two pilots, which, concededly, there were not. Mars had been instructed by Conquest's chief pilot to remove the tenth passenger seat, but he did not do so. The policy provided that it did not apply,

> "(4) while [the aircraft is] being operated under circumstances requiring a special permit or waiver from the Civil Aeronautics Authority (even though granted)."

8. This conclusion is not only a close one, but attributes substantial carelessness to the preparer of Endorsement 7, a fact perhaps worth noting when another aspect of Endorsement 7 is considered, post.

If violation of this regulation fell within this exclusion clause, that is the end of the case. *Arnold v. Globe Indem. Co.*, 6 Cir., 1969, 416 F. 2d 119, 122; *Underwriters at Lloyd's of London v. Cordova Airlines, Inc.*, 9 Cir., 1960, 283 F. 2d 659, 665; *Bruce v. Lumberman's Mut. Cas. Co.*, 4 Cir., 1955, 222 F. 2d 642, 645. Exclusion clauses, however, are to be strictly construed. We agree with the court in *Roach v. Churchman*, 8 Cir., 1970, 431 F. 2d 849, that if every violation of a regulation exempted the insurer, it is likely that almost any accident would be excluded, and that such an interpretation is to be avoided if reasonably possible. It may be that a fair meaning of this clause would be to confine it to those FAA regulations in which there are express provisions for waiver or amendment. *Cf. Cordova Airlines, Inc.*, ante. We need not decide this point, however, because of Conquest's breach of the two-pilot requirement contained in the policy itself.

Night Flight.

In the negotiations for the policy Gonzalez was told that the company would require two pilots for night flights. The policy, when issued, provided in Endorsement 1, policy, when issued, provided in Endorsement 1,

> "Warranted co-pilot to be carried on all instrument flight rules or night flights."

The court charged the jury, without exception by defendants, that this provision "in which the insured warrants that a co-pilot will be carried on night flights is valid and binding upon the insured, provided it is not ambiguous, and [if] there is a breach of warranty there is no coverage and no recovery permitted under the policy." This was correct. *Coffey v. Indiana Lumberman's Mut. Ins. Co.*, 6 Cir., 1967, 372 F. 2d 646, 648; *Fidelity-Phenix Fire Ins. Co. v. Pilot*

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Freight Carriers, Inc., 4 Cir., 1952, 193 F. 2d 812, 815-16, 817-18; *Henjes v. Aetna Ins. Co.*, 2 Cir., 1943, 132 F. 2d 715, 718-19, *cert. denied*, 319 U. S. 760. Claimants defend on the ground that the warranty was in fact ambiguous in respect to the term night flight.

The FAA regulations define night as follows.

> " 'Night' means the time between the end of evening civil twilight and the beginning of morning civil twilight, as published in the American Air Almanac, converted to local time." 14 C. F. R. § 1.1, *Definitions.*

It was stipulated that on the day in question the sun set at 5:37, civil twilight ended at 6:07, and the plane took off at 6:19, or 12 minutes after FAA night had commenced. In this posture claimants note that neither the policy nor the regulations define night flight. They then point to section 61.47(b), which reads as follows:

> "(b) *Night experience.* No person may act as pilot in command of an aircraft carrying passengers during the period beginning 1 hour after sunset and ending 1 hour before sunrise (as published in the American Air Almanac) unless, within the preceding 90 days, he has made at least five takeoffs and five landings to a full stop during that period of the day."

This regulation was made much of during the trial, and was presented to the jury by claimants as "defining night flying."[9] This involves so many errors that it is difficult to know where to begin. In the first place, quite apart from the seeming illogic of night meaning one period of time, and a night flight another, 14 C. F. R. § 1.1, contains, alpha-

9. Singularly, the court, although it read the provision in full, then charged the jury, without exception, "This is not a definition, but a safety operating rule."

betically, over one hundred definitions, and following night gives no separate definition for night flying or night flight. If, for any reason, a different one was intended, this would have been the place for it. We do not accept claimants' criticism of Commercial as seeking to "engraft" the definition of night "into the term night flight." The manifest purpose of the word night is to refer to activities that occur at a certain time. Secondly, as the court charged the jury, n. 9, ante, section 61.47(b) did not even purport to be a definition; it is apparent that the section is simply a "refresher" provision, not a definition of night flight. The selection of a high degree of darkness, *see* n. 10, post, to achieve the maximum benefit from this review exercise, and the failure to make the requirement applicable to a lesser degree of darkness, is not to be read as creating an ambiguity contradicting the regulation's explicit definition of "night," or its application to regulations specially directed thereto.

Finally, claimants' contentions proves too much. The regulations contain many provisions relating to night flights, and if because of this special section the word night, when modifying flight, does not mean what it is otherwise defined as meaning, the entire scheme of the regulations would be upset. It cannot be that because of section 61.47(b) this particular flight though obliged to carry "night" equipment, section 135.153, and subject to a regulation for "night" takeoff, section 135.87, was not subject to "*Visual flight rule (night).* For VFR flight at night," section 91.33(c). These pari materia provisions were brought into the policy by virtue of Exclusion (d), which provided that the policy did not cover operation "in violation of any air navigation regulations or instructions applying to . . . night flying." To say under such circumstances that because one dictionary meaning of night is darkness, and

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some of the witnesses said there was still light,[10] the regulations for night flying applied, but it was not a night flight with respect to the two-pilot requirement, would be to abuse beyond recognition the rule that insurance policies are to be construed against the company. As we said with relation to "command time," persons engaged in the aviation industry must be presumed to contract with relation to the accepted industry terminology to which they are subject unless there is something affirmative to the contrary. Here there was nothing.[11] The absence of a second pilot was a material breach of the policy.

The Policy.

Commercial attached to its complaint a copy of what it alleged to be the insurance policy, including six allonges entitled Endorsements 1, 2, 3, 4, 5 and 7, *viz.*, with no endorsement number 6. The endorsements added benefits, for an extra premium, *e.g.*, 4 and 7, or imposed restrictions, *e.g.*, 5. Although there was no endorsement numbered 6

10. There are, of course, degrees of darkness, *viz.*, end of civil twilight, nautical twilight, and astronomical twilight. *See* Webster's Third New International Dictionary. Darkness also varies from day to day, depending on weather conditions; scarcely a test for the operation of a commercial airline.

11. As a final effort, claimants attempt to make an inocente out of Gonzalez. On his own testimony, however, he had had a pilot's license, requiring knowledge of the regulations, since 1958, and a commercial pilot's license since 1962, with 3400 hours of logged time in 1968 when he applied for the policy. In addition, he had had experience with aircraft insurance. No amount of tempering the wind to "a reasonable person unacquainted with the niceties of insurance," *see Marston*, n. 7, ante, at 1039, could permit him to claim that he did not understand the word "night" when used in connection with flying. We somewhat regret the brevity of our quoted expression in *Marston*, because of the court's apparent misunderstanding and overextension. Naturally, we meant a reasonable person in the position of the insured. A business or a professional entering into a contract is expected to have the usual sophistication and understanding of those in the industry to which the contract relates. *Porto Rico Sugar Co. v. Lorenzo*, 1912, 222 U. S. 481.

attached, Endorsement 7, the one which added the Twin Beech plane to the coverage, contained the following provision.

> "It is further understood and agreed that:
>
> (1) Such insurance as is provided hereunder with respect to the above described aircraft applies subject to the same purposes of use, geographical limits and pilot warranties as expressed in Items 7, 8 and 9 of the 'Declarations,' as completed/extended by Endorsements 1, 2 (without requisite to be checked out by Dornier factory) and 6 of this policy;"

As against this implication that there was an Endorsement 6 which Commercial had failed to reproduce, when Gonzalez was deposed a few months after suit and exhibited the original policy it, too, had no such endorsement.[12] After introducing the policy at the trial Gonzalez first said that he could not say whether it was complete, because the pages were "separated." He was reminded that they were in that condition when he produced them at the deposition, and had said they were complete. The separated pages as introduced at the trial, and numbered and initialed by notary at the deposition, clearly showed there was no endorsement 6.

Later during the trial, although conceding that Gonzalez and counsel for Commercial had stated that this was the whole policy, counsel for claimants demanded of Commercial that it produce Endorsement 6. A sidebar conference took place, during which the court stated, "If you inform the Court there is no endorsement 6 that's all right." Commercial's counsel repeated that claimants' counsel had been told that there never had been such an

12. Parenthetically, it will be recalled that if we had previously assumed the preparer of Endorsement 7 to be careless, the case would have ended then and there. *See* n. 8, ante.

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endorsement. After some further argument between the attorneys, counsel for the insured interjected, "So far as Conquest Airways, I would like the Judge to instruct the jury that the fact that there is no endorsement 6 does not help either of the parties or hurt them." The court closed the bench conference by saying it would hear all parties when instructions were discussed.

If the court's remark was not a positive statement that Commercial need do nothing further, it was at least reasonably capable of being so understood and it was apparent that Commercial's counsel so took it. Nevertheless, when the court came to charge the jury it said,

> "The insurance company at no time introduced Endorsement Number 6 to the policy, nor did it offer any evidence to show that Endorsement 6 was not available to them.
>
> "I instruct you that under the law of Puerto Rico, you must presume that the provisions of Endorsement #6 to the policy contain material unfavorable to the insurance company's case."

Quite apart from the improper direction "must" rather than "may," this charge would seem to permit a finding than an endorsement 6 had eliminated any condition the jury chose, without the need of analysis or further consideration. However, before reaching the question of new trial, our first consideration is whether the absence of an endorsement 6 deprived Commercial of its right to a directed verdict because of the breach of the night flight provision.

The court nowhere suggested what "material unfavorable to the insurance company" the jury could find was contained in the absent endorsement, and, as we noted ante, charged the jury in positive terms that the night flight pro-

vision in Endorsement 1 was binding on the insured. Nor did claimants' counsel, in their summation, make any reference to the absence of an endorsement. We will, however, consider the question in the light most favorable to claimants, namely their present suggestion that although Endorsement 7 incorporated Endorsement 1, the absent endorsement may have removed the night flight two pilot requirement therefrom. We note at the outset, however, that there can be no rational suggestion that it removed it simply for the Twin Beech. Not only did Gonzalez receive Endorsement 7 unaccompanied by Endorsement 6, but Endorsement 7, as has already been noted, contained a special modification of Endorsement 1 with respect to the Twin Beech and would presumably have contained any other if any other had been intended. The issue, therefore, is whether it could be inferred that the company issued a general revocation of the two pilot requirement, without cost, because Gonzalez never paid for it or by accepting agreed to pay for it, and which, because of some mistake, Gonzalez never received.

It is elementary that if a party has evidence, here, allegedly, a document, in its control and fails to produce it, an inference may be warranted that the document would have been unfavorable. However, there are two conditions. Not only must it appear that the evidence is available, and specially available, *cf. Kean v. Commissioner,* 9 Cir., 1972, 469 F. 2d 1183, 1187-88; *United States v. Johnson,* 1 Cir., 1972, 467 F. 2d 804, 808, *cert. denied,* 410 U. S. 909, to the non-producing party, but it must appear that that party had some reason to suppose that non-production would justfiy the inference. This not only means a "factual area in which [the inference] can logically operate," *see Wilson v. United States,* 8 Cir., 1965, 352 F. 2d 889, 892, *cert. denied,* 383 U. S. 944; *Jenkins v. Bierschenk,* 8 Cir., 1964, 333 F. 2d 421, 425,

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but, what is determinative here, the totality of the circumstances must bring home to the non-producing party notice that the inference may be drawn. Here, not only was the insured the party possessing the policy,[13] but it disclaimed knowledge of an endorsement number 6, which was in itself substantial evidence that it did not exist, thereby undercutting the court's patently erroneous charge affirmatively accepting existence and stating that Commercial had done nothing to show it was not available. But of more importance, the record had been left, in light of the court's statement that counsel's representation made it "all right," that Commercial's counsel had been led to believe that there was no burden on him to do anything further.

In view of this, Commercial's position was little different from the defendant in *Case v. New York Central R. R.*, 2 Cir., 1964, 329 F. 2d 936. There the defendant introduced hearsay testimony that its absent employee witnesses had said they could contribute nothing. The court said, "That finishes that." The court of appeals held that in these circumstances no inferences were to be drawn from their non-production, and that if the plaintiff had been dissatisfied he should have taken steps. So here claimants, with, as they themselves pointed out, seven days left before the end of trial, could have served a subpoena duces tecum. However, although knowing of the court's statement and its effect on counsel, they did nothing. This was not to be excused by any theory that the burden of proof was on Commercial because it had brought the suit; Commercial had satisfied its burden.

More important substantively, even if inferences were permitted to be drawn we would be hard put to think that

13. The statement in claimants' brief that the company was the "custodians (sic) of the original policy" is, of course, erroneous. An insurance company keeps records, but the policy is customarily delivered to the insured, and was in this case.

a jury could be allowed to speculate that the company, unbeknownst to Gonzalez, had issued a free waiver of the requirement that there be two pilots on night flights. Gonzalez testified that before purchasing the policy he shopped around for the lowest cost, a matter of significance when the insured is seeking a broad interpretation of the policy. *Cf. American Employers' Ins. Co. v. Maryland Cas. Co.*, 1 Cir., 1/15/75. That a low premium company, which insisted from the outset on two pilots for night flights, should thereafter, without charge, issue an endorsement renouncing that substantial safeguard, is hard to conceive. As the court said in *Jenkins v. Bierschenk*, ante, at 425, "The supposition must rise above the level of mere possibility." Moreover, there was an opposing inference. Endorsement 5 had been a restriction. If one could suppose that there was in fact an endorsement 6 which the company, in preparing the copy of the policy, had overlooked, it could have been one that Gonzalez, in studying the policy preparatory to defending the suit, found detrimental. His separating the pages, and his failure to produce an endorsement 6, could be due to the fortunate discovery from examining the pleadings that the company had overlooked it, so that its disappearance would pass unnoticed. As was held in *Felice v. Long Island R. R. Co.*, 2 Cir., 1970, 426 F. 2d 192, 195, *cert. denied*, 400 U. S. 820, if the court instructs that an inference may be drawn against one party, it must point out, where appropriate, that there is an opposing inference that the jury must consider as well.[14]

14. We do not mean by this to charge Gonzalez with dishonesty. He and the company were in accord as to the content of the policy. We merely say that if claimant under these circumstances choose to make charges of concealment, it is not a one-way street. We may add, what perhaps should have prefaced the Policy portion of this opinion, that we have grave reservations whether, in the absence of proof of collusion, a direct action statute can permit a claimant, who stands in the shoes of the insured, to assert that the policy differs from what the insured and the insurer agree were its terms.

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In sum, to infer on this record that there had been a waiver of the requirement that there be two pilots on night flights would seem the rankest speculation. We need not, however, decide this question. Since an inference that the policy was other than as identified by the insured and introduced in evidence was precluded in any event, not only was the charge erroneous but, on the agreed evidence as to the time of takeoff and absence of a second pilot, a verdict of non-liability should have been directed.

The judgments against Commercial are vacated and the case remanded with directions to enter judgments in its favor on the complaint and on the counterclaims.[15]

15. We have not hitherto mentioned that Gonzalez and Conquest filed counterclaims for injury to their business caused by Commercial's denying liability under the policy. These, too, must fail.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 74-1132.

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY,
Plaintiff, Appellant,

v.

HECTOR GONZALEZ, ET AL.,
Defendants, Appellees.

Before COFFIN, *Chief Judge*, ALDRICH and CAMPBELL, *Circuit Judges.*

MEMORANDUM ON PETITION FOR REHEARING.

Entered March 25, 1975.

Per Curiam. In their Introductory Statement to their 13-page petition for rehearing petitioners state that what is now being presented has "not been argued previously," presumably a reference to Local Rule 15. Since we find this largely not so, we might deny the petition forthwith, but a few comments are perhaps in order.

At the outset claimants cite *Barreras v. Santana*, 87 P. R. R. 215, a case cited five times in their original brief, once including the precise quotation claimants presently repeat. Nor do they add any new Puerto Rico decisions that it might be thought we had overlooked.[1]

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1. In this connection claimants quote a phrase from our opinion (although, without indication, omitting two words in the middle) seeking to go back to an argument to which we responded in footnote 11.

BLEED THROUGH

Next, claimants repeat their arguments as to the burden of proof. In this connection, their present objections to our finding the FAA regulations controlling were both fully argued before—one, that a number of witnesses had different ideas of what was a "night flight," and that the regulations, although defining "night," did not define "night flight," so that, somehow, this covered a different period. How claimants could say that they had not previously argued these propositions is hard to think.[2]

In point of fact, it does not make any difference where is the burden of proof with respect to defining night flight, as either a theoretical or a practical matter, and perhaps we should have said so expressly. We thought our opinion made it sufficiently clear that where the policy imported the regulations, *see* slip opinion, p. 9 (which claimants' brief quoted in n. 2, ante, conceded, although blatantly misstating the regulations), and the regulations were unambiguous, that was the end of it.

The balance of the petition is, again, a recast, if not repetition, of what had been fully argued before. We do not find it in any way more persuasive.

Petition denied.

By the Court:

/s/ Dana H. Gallup

Clerk.

[cc. Messrs. Perkins, Polanco-Abreu, Beasley, and Nachman.]

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2. This allegation is on a par with that in claimants' original brief, p. 42, that the "use of 'night flight' in the policy, other than Endorsement 1, was in reference to air navigation regulations, *which refer to a period one hour after sunset.*" (Emphasis ours). Out of courtesy to counsel we did not comment on this statement in an opinion that was to be published.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 74-1132.

COMMERCIAL INSURANCE COMPANY
OF NEWARK, NEW JERSEY,

Appellant,

v.

HECTOR GONZALEZ, ET AL.,

Appellee.

PETITION FOR REHEARING.

Claimants, through one of their Attorneys, JAMES E. BEASLEY, ESQUIRE, move for a Rehearing of this Appeal, determined by Opinion and Order of March 11, 1975.

INTRODUCTORY STATEMENT.

This case was tried and argued under Puerto Rican law, which provides that insurance contracts must be "most strongly construed in favor of the insured", and that undefined contractual terms must be interpreted "as persons of usual and ordinary understanding would construe" them. *Barreras v. Santana,* 87 P. R. R. 215, 218, 222 (1963).[1] Pursuant to the *Erie* doctrine, this Court recognized these principles in *Marston v. American Employers Insurance Co.,* 439 F. 2d 1035, 1039 (1st Cir. 1971). In entering judgment *non obstante veredicto* in favor of the

1. In its Motion for a directed verdict on the "night flight" issue, Commercial argued that the contractual term "must be given its common and ordinary interpretation as all ordinary people would understand" (R. Tr. 474).

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plaintiff-insurer, this Honorable Court has modified that standard; such a modification raises serious *Erie* questions. Further, this Honorable Court has held that the burden of proof shifted to the defendant-insured on the "night flight" issue, a holding unprecedented in case law. Because evidence was presented under the former standards of proof, this change of burdens after trial deprives the insured and the Claimants of their constitutional right to a jury trial. These issues and the evidence in light of the new standard have not been argued previously, because of the Claimants' assumption that established law would govern the trial and appeal.

In support of their Petition for Rehearing, Claimants aver the following:

1. In its Opinion of March 11, 1975, this Honorable Court held that undefined terms of an insurance contract must be interpreted according to the "usual sophistication of those in the industry" (Opinion, at 9 n. 9). The Court further created a presumption that the term "night flight" had an "accepted industry terminology to which [the parties] are subject unless there is something affirmative to the contrary" (Opinion, at 9). To Claimants' knowledge, such a holding is the first instance in which an undefined term in an insurance contract has been given a presumptive meaning favoring the *insurer.*[2] It is respectfully suggested that the *Erie* doctrine requires a closer examination of Puerto Rican law.

2. Having determined that the term "night flight" had such a presumptive meaning,[3] this Court held that a di-

2. Two of the cases cited by the Court (Opinion, at 4) do not involve insurance contracts. The third, *Petro v. Ohio Cas. Ins. Co.*, 95 F. Supp. 59, 62 (S. D. Calif. 1950), interprets a term clearly defined by FAA regulations ("student pilot") *in favor of the insured.*

3. Claimants have previously noted that the policy itself did not consider FAA regulations determinative on the question of definition. Claimants' Brief, at 42 n. 29.

rected verdict, in favor of the plaintiff and *against the insured,* was proper, because the insured did not meet his burden of presenting affirmative evidence (Opinion, at 9). Thus, even though the insurer was the proponent, the burden of proof was *shifted* to the defendant-insured. Neither Commercial (R. Tr. 474, 537) nor the expansive Puerto Rican policy favoring insureds had previously suggested that the burden of proof was that of the defendant-insured.

3. The right to a trial of factual issues by a jury is guaranteed by the Seventh Amendment. Parties, in presenting their case at trial, are entitled to rely upon established rules in determining the proof necessary to create a jury issue. *Cf. Mid-continent Broadcasting Co. v. North Central Airlines, Inc.,* 471 F. 2d 357, 358-59 (8th Cir. 1973). Specifically, because neither Commercial nor case law had suggested that the burden of proof had shifted to them, the defendants were entitled to assume that their right to a jury trial would be preserved without their presenting affirmative evidence on the "night flight" issue. If, upon jeopardy of losing their right to a jury trial, the defendants were required to present affirmative evidence, they were entitled to notice *before* trial.[4] By holding, *after trial,* that the burden of proof shifted to the defendants, this Court has deprived the

4. An elemental protective device to a litigant's right to a jury trial is the requirement that a motion for a directed verdict present the "specific grounds therefor". Federal Rules of Civil Procedure 50(a). Absent such pre-

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4. Claimants have previously noted that even on appeal, Commercial was not arguing that the burden of proof on the "night flight" issue had shifted to the Claimants. Claimants' Brief, at 42 n. 30.

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sentation, judgment n.o.v. cannot be granted. *E.g., Budge Mfg. Co. v. United States,* 280 F. 2d 414 (3d Cir. 1960). The proper remedy, in the absence of an appropriately stated Rule 50 motion, is to grant a new trial, so that evidentiary deficiencies may be corrected. *See Cowger v. Arnold,* 460 F. 2d 219, 222 (3d Cir. 1972). In this case, on the "night flight" issue, Commercial argued that it was "dark" at the time of the crash, and therefore night (R. Tr. 474); Commercial did not argue that it was entitled to judgment as a matter of law because the insured failed to meet his burden of proof. For this additional reason, Claimants are deprived of their constitutional right to a jury trial, as protected by Rule 50, if this Court grants judgment on a basis never presented to the Trial Court (or, for that matter, even on appeal).

5. If the parties, in the absence of any affirmative evidence of intent presented by the proponent-insurer,[5] may be bound by a presumption (not contained in the policy) that FAA regulations control undefined terms, such a presumption should not result in a directed verdict *against* the insured where those terms are not clearly understood by the industry (Opinion, at 9 & 9 n. 11). Although this Court has found that "night flight" had a clear meaning under FAA regulations, the proof at trial indicated that neither the FAA regulations nor the term "night flight" was clearly understood by the industry:

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5. While the "night-flying" co-pilot requirement was discussed by the parties (R. Tr. 192), neither Gonzalez nor any of Commercial's agents (none of whom appeared at trial) testified that the parties understood what "night flight" meant; that it was their intent to be bound by the FAA regulations; or that Gonzalez was, in fact, familiar with the FAA regulations concerning "night flight" when he negotiated the policy or used his planes. Certainly, Commercial did not consider certain "flight at night" regulations (cited by this Court, Opinion at 8-9) determinatives, for they were not cited at trial. *See* Claimants' Brief, at 42, 44 n. 31.

a. The local FAA manager did not know where (if at all) "night flight" was defined in his agency's regulations (R. Tr. 465), but stated that it was his understanding, after twenty years' flight experience, that "night flight" meant thirty (30) minutes after sunset [*i.e.*, not the FAA definition assumed by this Court to be clear and generally understood] (R. Tr. 467-68). He did not know what "night flight" meant to other people (R. Tr. 468). He stated that FAA Regulation § 61.47(b) might "indicate a definition" of "night flight" (R. Tr. 469).

b. The manager of the Virgin Islands airport, with some twenty-five (25) years' flight experience (R. Tr. 385), defined "night" as the period when "there was no more illumination from the rays of the sun", or "dark" (R. Tr. 396).

c. Commercial's own expert testified, contrary to this Court's conclusively binding presumption, that there is *no* definition of "night flight" in the FAA regulations, and that his definition of "night flight" was merely one of personal opinion (142b).

6. It is respectfully submitted that if three experts, two of whom were of Commercial's choice, could not find a definition of "night flight" in the FAA regulations, and if each defined the term differently, then it cannot be said, as a matter of law, that there was an "accepted industry terminology". Such a conclusion should especially flow under Puerto Rican policy, which strongly favors the insured.

7. *Endorsement 6:* This Court further deprives Claimants of their constitutional right to a jury trial by holding that, because conflicting inferences were possible concern-

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ing Endorsement 6, therefore no jury issue was presented.[6] To the contrary, even if an adverse inference against Commercial is not mandated as a matter of law, certainly the evidence is susceptible of an inference favoring the insured. To forbid jury determination of the conflicting inferences contravenes both Puerto Rican and constitutional policy. The facts must, as this Court has held, be viewed most favorably to the *Claimants* (Opinion, at 12).

a. Gonzalez testified that, in negotiating the Twin Beech policy (as opposed to the more problematical Dorniers), he and Perez discussed the customary single-pilot requirements for Twin Beech aircraft (47b), that Perez agreed that, on the Twin Beech, a co-pilot would be required *only* on instrument flights (43b), and that Gonzalez assumed that such was their agreement because there was no further mention of this waiver of the "night flight" requirement (43b).

b. Perez was not called to contradict this testimony.

c. Endorsement 6 was not applicable to either Dornier, including the one insured *after* the Twin Beech (compare Opinion, at 12). Endorsement 6 was applicable *only* to the Twin Beech, and while Endorsement 6 may have been carelessly drafted *by Commercial* (Opinion, at 6 n. 8, 10 n. 12), the specific recognition of a presumably contemporaneously drafted Endorsement 6 cannot be dismissed, as a matter of law, as a drafting error.

d. There is no testimony to support this Court's binding conclusion that Commercial kept only "records"

6. It is not Claimants' purpose here to challenge this Court's determination that the trial court's charge on Endorsement 6 was "patently erroneous" (Opinion, at 13). The remedy for a patently erroneous charge is a new trial, not judgment n.o.v.

(Opinion, at 13 n. 13). The Company could not have drafted subsequent endorsements without a copy of the full policy. Commercial has never stated (much less produced testimony), at trial, in its Brief, or in its Reply Brief, that it did not maintain, in New York or Newark, a copy (if not the original) of the full policy.

e. There is no Record indication of where Commercial's Complaint copy of the policy came from, nor is there any Record indication of the custodial chain of the policy that Gonzalez possessed, from the time of delivery until the time of his deposition.[7]

f. While there may have been agreement that the policy produced at trial was the same as that produced at Gonzalez's deposition, five months after the crash, there was never any agreement that such was the whole policy as delivered initially to Gonzalez.[8] Mr. Nachman did not

7. While Gonzalez might have removed Endorsement 6 after discovering that the Complaint copy did not include it (Opinion, at 14), such an inference follows only *if* it is further assumed that the Complaint copy did not come from Commercial's use of Gonzalez's (not its own) records. But if the Complaint copy came from the Gonzalez copy, then Commercial had custody. If, as this Court has found, "an insurance company keeps records, but the policy is customarily delivered to the insured, and was in this case" (Opinion, at 13 n. 13), then the Complaint copy *had* to come from Gonzalez's records. In any event, Commercial, which did not notify Gonzalez of any contractual dispute until the filing of the Complaint (R. Tr. 617), would have had access to Gonzalez's records before the filing of the Complaint, through its adjustor's frequent visits (R. Tr. 613).

8. The Court's interpretation of the Record (Opinion, at 10) represents but one possible factual finding. Mr. Gonzalez was questioned concerning the "entire policy you received, prior to insuring the Beechcraft", and it was that policy that had been separated (R. Tr. 239). (The endorsements pertaining to the Twin Beech were received months after the master policy, and thus would not be "together". Gonzalez did not testify (R. Tr. 239) that he separated the policy(Opinion, at 14) ; it was the Court that stapled the policy (R. Tr. 242).) Gonzalez testified that the deposition copy "seemed" to constitute everything (R. Tr. 242), but this assumption was ob-

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so stipulate (R. Tr. 400, 402), and the following day refused to stipulate (and accordingly the Trial Court refused to accept) the Complaint copy as the "whole" policy (140b). To presume, after trial, that a fact has been stipulated, especially where there is no indication of independent verification of the offer (compare Commercial's Reply Brief, at 3 n.*), denies litigants their right to a jury trial.[9] At no time did the Trial Court inform the Claimants that Commercial did not have the burden of producing the whole policy (R. Tr. 402) ("I am only saying that you have the burden of proof").

g. If this Court's binding presumption concerning Gonzalez's understanding of the term "night flight" is valid, it would stretch a jury's credibility that Endorsement 6 could be further detrimental to his case (compare Opinion, at 14).

h. There is *absolutely no proof, no representation,* and *no indication* that the copy of the policy in Commercial's underwriting department was the one from which the Complaint copy was taken, that it was ever examined by or presented to trial counsel, or that trial or appellate counsel ever made an independent investigation of the facts.

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8. (Cont'd.)

viously incorrect. Not marked by the notary at deposition or by Gonzalez at trial (R. Tr. 234) were portions of the policy that *were* produced at trial (R. Ex. 51 [including exclusions] and R. Ex. 54). There was no testimony that Gonzalez did not received the specifically noted Endorsement 6; there was testimony that the "night flight" requirement had been waived.

9. Mr. Nachman, on behalf of the Claimants, did not join in Conquest's request that the non-production of Endorsement 6 be ignored (Opinion, at 11). Nor should such a request (unauthorized by Claimants) be interpreted as a conclusive ruling of law.

i. If, as this Court has found, "opposing inferences" were possible (Opinion, at 14), a jury question was presented. While this Court now finds that Commercial satisfied its burden (Opinion, at 13), the Trial Court never so ruled.[10] Thus, again, this Court has taken a factual question from the jury in order to grant a directed verdict in favor of the plaintiff, where no trial request was made by Commercial for a decision as a matter of law. Claimants, who are entirely innocent parties to an insurance contract presumptively granting them protection, have been deprived of their constitutional right to have a jury resolve conflicting inferences.

8. Without explicitly holding that insurance contracts are to be interpreted in favor of the insurer, this Court has held an insured bound to a contractual term that was not defined in the policy, that was (on this Record) never discussed with the insured, and that was defined differently by each of three experts possessing more experience than the insured. If experts cannot agree upon a definition,

10. It is respectfully suggested that nowhere in this record was "it apparent that Commercial's counsel" misunderstood that the Trial Court was reserving ruling (Opinion, at 11); his attempted production of the Complaint copy of the following day indicates his knowledge that his proofs were still being challenged (140b). It was only Commercial's appellate counsel that complained that Commercial was misled; trial counsel made no such complaint (R. Tr. 533).

But if Commercial could be misled, so could the Claimants. Mr. Nachman insisted that Commercial had the burden of proof (R. Tr. 402), refused the proffered stipulation, refused the proffered policy (140b), was told (as were all parties) that the Court was reserving its ruling (R. Tr. 403), and in fact received the charge he requested.

This is not a case where *testimony* was presented to explain the absence of a witness or his lack of pertinent knowledge, nor is it a case where the Trial Court made a definitive ruling. *Case v. New York Central R. R.*, 329 F. 2d 936 (2d Cir. 1964). The absence of Endorsement 6 has never been explained by a witness (or attorney) with independent knowledge of the facts, and no definitive ruling was made in favor of Commercial such as to give defendants notice that *their* burden of proof had not been met.

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and if experts, prepared for trial, cannot locate the FAA definition that this Court now holds to be presumptively binding, it is respectfully submitted that, under Puerto Rican law, the insured cannot be bound as a matter of law.

WHEREFORE, Claimants respectfully urge this Honorable Court to reconsider its disposition of this case in light of the defendants' constitutional right to a jury trial, to re-examine its amplification of the *Marston* principles in view of the *Erie* doctrine and Puerto Rican law, to consider the startling conflicts of opinion within the industry concerning the definition of "night flight", and to grant rehearing in this important case.

Respectfully submitted,

JAMES E. BEASLEY,
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Attorneys for Defendant-Counterclaimants.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 74-1132.

COMMERCIAL INSURANCE COMPANY
OF NEWARK, NEW JERSEY,

Appellant,

v.

HECTOR GONZALEZ, ET AL.,

Appellee.

CERTIFICATION OF SERVICE.

JAMES E. BEASLEY, ESQUIRE, one of the Attorneys for Claimants, hereby certifies that on March 18, 1975, a copy of the foregoing Petition for Rehearing was mailed to:

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In the Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 74-1587.

HECTOR GONZALEZ, ET AL.,
Petitioners,

v.

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Respondent in Opposition.

Question Presented for Review.

Should this Court grant certiorari to litigants who claim they were denied their right to a jury trial by the fact that the First Circuit Court of Appeals concluded on all the evidence that an insurance contract could be interpreted in only one way, when that interpretation was fully litigated in the District Court?

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Statement of the Case.

In mid-1968 the respondent Commercial Insurance Company of Newark, New Jersey (Commercial) contracted with Conquest Airways, Inc. (Conquest) to insure certain air taxi operations of Conquest. That insurance contract was negotiated by the president of Conquest, who was an aviation professional with a pilot's license since 1958, a commercial license since 1962, and 3400 hours of logged flight time (A22 n.11). Under one typewritten provision of the insurance contract Conquest "warranted" that a copilot was to be carried on all instrument flight rules flights and "night flights." Several months later one of Conquest's planes, flying without a copilot, crashed at a time which was proven, without dispute by the claimants, to be "night" under the definition of that word set out in the regulations of the Federal Aviation Administration (FAA) (14 C.F.R. § 1.1 (1968)).

Contrary to the argument now made in the petition for certiorari, Commercial, from the very start of the fifteen-day trial on the coverage and liability questions in Commercial's declaratory judgment action against Conquest and the potential claimants, proposed that the term "night flights" in the insurance contract should be construed by reference to the precise definition of the word "night" in the FAA regulations. On the second day of trial, Commercial asked the District Court to take judicial notice of the definition section of the FAA regulations (R. Tr. 43),* and two days later read to the jury the definition of "night" which those regulations contain (R. Tr. 106-07). On the same day the contentions of the parties were discussed in a colloquy between counsel for the parties

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*Because of the bulk of the record appendix on appeal, it was divided into categories which were cited as "R. Tr." for transcript, "R. Ex." for exhibits, and "R. Pl." for pleadings.

and the court, in which Commercial contended that the term "night flights" was governed by the definition of "night" in the FAA regulations. (Original record, Vol. XXX, January 20, 1972, at 248-252.) In that exchange counsel for Commercial and counsel for the claimants agreed the term "night flights" was governed by the regulations.* The only dispute was between Commercial's contention that the definition of "night" was controlling, and claimants' contention that a section establishing certain "night experience" requirements was applicable. On the second day of the trial Commercial offered a witness who was a professional pilot with 6,000 hours of command pilot experience, whom the claimants acknowledged to be an aviation expert (R. Tr. 70-71), who testified that "night" was understood in the aviation profession to mean the same period as that described in the FAA regulations (R. Tr. 74).

At the conclusion of the coverage trial, Commercial moved for a directed verdict on the ground (among others) that the fatal flight was one at "night" under the definition in the FAA regulations (R. Tr. 475) and, when that motion was denied, submitted a requested instruction to the same effect (R. Pl. 162 (Instruction No. 13)). After the jury's verdict was returned, Commercial moved for judgment notwithstanding the verdict on the ground, among others, that the meaning of the term "night" was absolutely clear (R. Tr. 537).

Thus, the claimants at trial well understood that Commercial was arguing that the term "night flights" in the insurance contract should be construed in accordance with the definition of "night" in the FAA regulations. As noted above, the claimants themselves contended the term was to be construed in

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*"Mr. Nachman [lead counsel for the defendants]: . . . A night flight is defined in only one place, in the Civil Air Regulations.

Mr. Vivas [counsel for the plaintiff]: In only one place.

The Court: We agree on that."

(Original record, Vol. XXX, January 20, 1972, at 248.)

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accordance with the regulations, and they asked the District Court to take judicial notice of a different provision of the FAA regulations, which they contended at the trial, and on appeal, should be the basis for the interpretation of the term "night flight" (R. Tr. 86-87, 464-69). Until they filed their petition for rehearing in the First Circuit, the claimants had therefore taken the position that the insurance contract term "night flights" was in fact to be construed by reference to the FAA regulations which set out the technical understanding of one familiar with aviation. The only difference between their position and that of Commercial concerned which provision of those regulations controlled.

This statement of facts presents all of the evidence and proceedings below which are necessary for a determination of the claimants' petition to this Court. In the interests of brevity there has been no attempt to deal with the extraneous matters and frequent misstatements in the statement of the case contained in the claimants' petition for certiorari. *

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*One such example, however, cannot go unrefuted. The claimants offhandedly suggest that Conquest's president testified that the "night flights" copilot warranty was waived (Petition at 4). The record referred to does not support that statement. Even if the record in question, consisting of the Conquest president's answers at a deposition, were admitted for more than the limited purpose of impeaching his testimony at the trial, the deposition answers stated no more than that an employee of a local insurance agency had said he was going to "request" the insurance company to make a change in the copilot requirement (R. Tr. 43b). The further erroneous suggestion (Petition at 4) that it was impossible to determine whether "this agreement" had been reduced to writing, because "the entire policy" was not produced at the trial, relates to an issue fully disposed of in the First Circuit opinion (A22-A28), which is not presented to this Court by the petition for certiorari. Furthermore, the First Circuit noted (A19), "[t]he court charged the jury, *without exception by defendants*, that this provision 'in which the insured warrants that a copilot will be carried on night flights is valid and binding upon the insured, provided it is not ambiguous, and [if] there is a breach of warranty there is no coverage and no recovery permitted under the policy.'" (Emphasis supplied.)

Argument.

The Decision By The Court Of Appeals Turned On An Issue Fully Litigated At Trial, On Which The Claimants Had A Full Opportunity To, And Did, Introduce Evidence.

This Court only needs to recognize the two essential flaws in the claimants' argument to determine that their petition must be denied. Their argument rests on the erroneous assumptions that the First Circuit based its decision upon a burden-of-proof shifting presumption, and that this presumption was "newly-created" (see, *e.g.*, Petition at 2, Question Presented). Neither assumption is correct.

As the First Circuit noted in its denial of the claimants' petition for rehearing (A30), the question of burden of proof never arose, since the meaning of the phrase "night flights" was so clear in light of the definition of "night" in the FAA regulations. The First Circuit's determination that the meaning of "night flights" is governed by the definition of "night" in the regulations does not come from the invocation of any burden of proof principles, but from applying familiar principles of contract construction to the terms of the insurance contract and the circumstances of the parties to the contract. Thus, the First Circuit noted that the contract itself "imported the regulations," by making reference to "air navigation regulations or instructions applying to . . . night flying" (A21-A22, A30).* And, noting that Gonzalez had extensive experience in

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*Even the clause that required a copilot on "night flights" also required a copilot on "instrument flight rules" flights. Giving terms of a contract their technical meaning where other provisions in the contract reflect reference to the source of the technical meaning is an application of well settled principles. *See, e.g., Petro* v. *Ohio Cas. Ins. Co.*, 95 F. Supp. 59, 62 (S.D. Calif. 1950); *Jamesway Corp.* v. *Worcester Valve Co.*, 443 F. 2d 205, 210 (1st Cir. 1971).

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the aviation industry, as a pilot, and in aircraft insurance (A22 n.11), the court applied the principle that a business or a professional person entering into a contract relating to a certain industry is expected to have the usual sophistication and understanding of those in the industry.

Nor does the First Circuit decision present a constitutional issue concerning the right to a jury trial. It is elementary under the established allocation of functions between court and jury that the determination whether a contract is ambiguous, and, if unambiguous, the determination of its meaning, are questions of law for the court to decide. *Whiting Stoker Co.* v. *Chicago Stoker Corp.*, 171 F. 2d 248, 250-251 (7th Cir. 1948), *cert. denied*, 337 U.S. 915 (1949); *Pipkin* v. *FMC Corporation*, 427 F. 2d 353, 356 (5th Cir. 1970). In determining upon the stipulated facts that the insurance contract was unambiguous and did not provide coverage for the air crash, the First Circuit was discharging the established responsibility of a court. The claim of a disappointed litigant that the court has erred in the construction of a contract does not convert the question of contract construction into an appropriate case for certiorari as involving a constitutional right to jury issue. If it did, every major case of contract construction would be waiting on the doorstep of this Court.

In their petition the claimants in effect concede this. They seek to convert the decision below into an alleged denial of jury trial by misstating the proceedings in the District Court. They allege that the decision of the First Circuit changed the applicable legal theory without warning on appeal.* Based on

*To the extent that the claimants suggest that the First Circuit's decision was "newly-created" law in general (see, *e.g.*, Petition at 6), their argument is frivolous. It is not "new" law to hold that technical terms in a contract between persons in a trade or business are construed in their technical sense. *Porto Rico Sugar Co.* v. *Lorenzo*, 222 U.S. 481, 482 (1912). Nor, clearly, is it "new" law to have the court, and not the jury, determine a question of law such as the interpretation of an unambiguous contract term. See cases cited in the preceding paragraph of the text, *supra*.

that supposed change, the claimants spin an argument that they were denied their right to a jury trial from the further allegation that they would have presented different arguments and evidence in the District Court had they known of the later theory. They therefore ask this Court for an opportunity to try this case again from the start, even though fifteen days of trial on the coverage issue alone were had below.

The facts of this case fail to support the essential parts of the claimants' argument. The insurance coverage issue was tried on the theory that the term "night flight" was to be construed in connection with the FAA regulations. At trial, as Commercial's statement of the case in this brief shows, Commercial from the very start directed the District Court to the FAA regulations for a definition of the term "night" (R. Tr. 43, 106-07). The District Court never adopted any legal theory which could have misled the claimants or caused them not to offer evidence which could have resulted in a different conclusion under the First Circuit's decision. Indeed, at the outset of the coverage trial, in its Pretrial Memorandum, the District Court invited the parties to present evidence on all coverage issues by its determination that the issues as to the lack of coverage "are mixed matters of law and fact which the Court finds should be decided at trial" (R. Pl. 151). The closest the District Court came to adopting any theory itself was in its instructions to the jury. The claimants cannot say that what they heard at that late point had any relevant effect on what they offered into evidence.

In fact, the claimants themselves agreed that the term "night flights" was a technical term (Original record, Vol. XXX, at 248). They simply proposed a different section of the FAA regulations as the source of a different technical definition for "night" (R. Tr. 86-87, 464-69). That argument, which they pressed as well on appeal, was demonstrated conclusively by the First Circuit decision to be wrong (A20-A22). But apart

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from its merits, the fact that the claimants pressed it in the trial court and on appeal belies their argument to this Court that the First Circuit's decision took them unfairly by surprise.

In fact, the First Circuit's decision applied the correct law which Commercial had proposed from the start. The claimants were fully aware of that argument, and proceeded to meet it as best they could. The claimants stretch credulity when they begin to argue, at this late stage, that they were taken by surprise. Losing on the merits of the coverage dispute may have surprised the claimants; but they had full opportunity to meet the issue in the District Court, and undertook to do so with whatever arguments or evidence they could muster.

Seen in its true light, it is understandable that the claimants' argument does not draw support from any of the cases cited in their petition. Cases cited (Petition at 9-10) as requiring a new trial rather than a direction to enter judgment for Commercial are not applicable to the present case. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), finding error in the direction of judgment notwithstanding the verdict in favor of a party who failed in the trial court to move for judgment notwithstanding the verdict, is irrelevant here. As the claimants themselves admit (Petition at 6), Commercial in fact moved in the District Court for judgment notwithstanding the verdict. Most of the other cases relied upon by the claimants are as readily distinguishable, since they relate to situations where for one reason or another the trial court's erroneous choice of the applicable rule apparently foreclosed the party from pursuing evidence which would have been relevant under the rule adopted by the Court of Appeals. *Byrd* v. *Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 532-33 (1958); *Weade* v. *Dichmann, Wright, & Pugh, Inc.*, 337 U.S. 801, 808-09 (1949); *Fountain* v. *Filson*, 336 U.S. 681, 683 (1949); *Schaff* v. *R.W. Claxton, Inc.*, 144 F. 2d 532, 533 (D.C. Cir. 1944). The claimants in this case had a full opportunity and in fact

presented evidence in attempted refutation of the point on which they ultimately lost. The District Court never made a ruling which could have foreclosed them from doing so. Rather by its Pretrial Memorandum it did precisely the opposite. How the claimants could say they were denied an opportunity to present their evidence is, as the First Circuit said of them in a different context, "hard to think" (A30).

The request which the claimants in truth make of this Court is that it review the record which the First Circuit reviewed, to see if this Court will arrive at a different conclusion. But this Court has repeatedly stated that it does not grant certiorari "to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). This Court consistently declines to interfere with the conclusions of Courts of Appeal, whether or not it would agree with such conclusions if it completely reviewed the evidence, when the conclusions are based upon the "appreciation of circumstances which admit of different interpretations." *Federal Trade Commission* v. *American Tobacco Co.*, 274 U.S. 543, 544 (1927). The claimants present only a question of construction of a particular contract which, under these principles, would not be a proper subject for certiorari.

If this Court granted certiorari in this case to review the determination of the First Circuit, there would be no basis in reason for denying certiorari to any other decision of any federal or state appellate court which determined a contract to be unambiguous and decided the interpretation of the contract as a question of law in accordance with the traditional responsibility of a court.

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Conclusion.

The petition for certiorari should be denied.

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